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IN THE

Supreme Court of the United States

No. 803

THE SCOTT REALTY COMPANY,

Petitioner.

vs.

THE LASALLE & KOCH COMPANY,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

EFFLER & EASTMAN,
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LEROY E. EASTMAN.

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OPINIONS IN COURTS BELOW

The Supreme Court of Ohio delivered no opinions. The Court of Appeals of Lucas County, Ohio, delivered an opinion dated April 27, 1942. It has not been officially reported. A copy of this opinion is attached to this brief as an appendix.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This Court has jurisdiction as provided in Title 28 U. S. C., Section 344, paragraph (b), Section 237, Judicial Code, as amended, to review on *certiorari* the judgment of the Court of Appeals of Lucas County, Ohio, entered July 3, 1942. (R. pp. 120-122). The judgment and order of the Supreme Court of Ohio, entered December 16, 1942, (R. p.

All forms of emphasis in this brief are ours unless the contrary is indicated.

937) in effect affirmed the judgment of the Court of Appeals and made it final. The judgment of the Court of Appeals deprived petitioner of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

See *Chesapeake & Ohio Railway Co. vs. Mihas*, 280 U. S. 102;
Tumey vs. State of Ohio, 273 U. S. 510;
Hetrick vs. Village of Lindsey, et al., 265 U. S. 384.

Article IV, Section 2, of the Ohio Constitution, so far as pertinent, is as follows:

> "It (the Supreme Court of Ohio) shall have * * * appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, * * *. In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review, and affirm, modify or reverse the judgment of the Court of Appeals. * * *"

The pertinent Sections of the General Code of Ohio, so far as applicable, are as follows:

> "Sec. 12223-4. The appeal shall be deemed perfected when written notice of appeal shall be filed with the lower court, tribunal, officer or commission. Where leave to appeal must be first obtained, notice of appeal shall also be filed in the appellate court. * * *"
>
> "Sec. 12223-7. The period of time after the entry of the order, judgment, decree, or other matter for review within which the appeal shall be perfected, unless otherwise provided by law, is as follows:
>
> "1. In appeals to the supreme court, to courts of appeals, or from municipal courts and from probate courts to courts of common pleas, within twenty (20) days.
>
> "* * *"

The judgment of the Court of Appeals, which is sanctioned and affirmed by the judgment and order of the Supreme Court of Ohio, is a denial of petitioner's right to due process in two respects, namely:

(a) The Court of Appeals sanctioned and upheld the award of the arbitrators made and procured without a hearing before said arbitrators. It is, and was at the time the lease in question was executed, the law of Ohio, as declared by the Supreme Court of Ohio in *Worthington vs. Hewes & McCann*, 19 Ohio St., 66 (1869), that an award of arbitrators appointed to value land under a 99-year lease is void unless a hearing is accorded the parties where such hearing is reasonably practicable. Under Ohio law, therefore, a hearing before the arbitrators was an essential element of due process. There was no hearing accorded petitioner, although a hearing was expressly requested by petitioner's attorney.

By means of the conspiracy and fraud below recited, respondent procured for itself an *ex parte* hearing. Respondent's officers and agents were permitted to submit, surreptitiously, evidence to the third arbitrator, with no opportunity for petitioner to cross examine or to refute the false statements made.

(b) The other errors of the Court of Appeals are so gross and obvious as to amount to arbitrary and capricious exercise of power.

These errors of the Court of Appeals, including the arbitrary findings of fact which are not supported by any evidence whatsoever or which are contrary to the undisputed evidence, are discussed later in this brief.

The federal questions were raised by Notice of Appeal filed in the Court of Appeals July 22, 1942 (R. p. 122), and by similar notice filed on the same date in the Supreme Court of Ohio (R. p. 928), and by Assignment of Errors

filed in the Supreme Court of Ohio August 6, 1942 (R. p. 930), and by Application for Rehearing filed in the Supreme Court of Ohio December 30, 1942. (R. p. 936.) The assignment of errors makes specific reference to petitioner's claim that the findings, orders, judgment and decree of the Court of Appeals in sustaining said award violated petitioner's right to due process of law under Section 1 of the Fourteenth Amendment of the Constitution of the United States in that:

> "(a) Appellant was denied a hearing before said arbitrators;
>
> "(b) The errors of the Court of Appeals are so gross and obvious as to amount to arbitrary and capricious exercise of power." (R. p. 931).

The application for rehearing filed in the Supreme Court likewise makes specific reference to the violation of the Fourteenth Amendment.

These federal questions were passed upon adversely by the Supreme Court of Ohio by its judgment and order of December 16, 1942, and by its decision of January 6, 1943, in which the application for rehearing was denied. (R. p. 938.)

STATEMENT OF CASE

This is an action originally brought in the Court of Common Pleas of Lucas County, Ohio, by The Scott Realty Company, the plaintiff therein, to set aside, because of fraud and irregularities, an award of arbitrators appointed to determine the value of land under a 99-year lease made in 1916, in which The Scott Realty Company, plaintiff therein, is lessor, and The Lasalle & Koch Company, defendant therein, is lessee.

The real estate involved is the site of Toledo's largest department store, operated by respondent, and is located

at the southeast corner of Adams and Huron Streets in what is known as the 100% retail district. The original building of seven stories was built by petitioner expressly for respondent in 1916, pursuant to the terms of the lease. Three additional stories were added by respondent in 1927.

The lease provides for stipulated rentals to August 1, 1939. For the 10-year period commencing on that date, the real estate, exclusive of buildings and improvements, was to be valued for the purpose of determining rentals, the same to be 4% per annum of the fair market value.

The lease contained the following provisions for the purpose of determining the value of the real estate as the basis for the rentals:

> "If the parties hereto fail to agree upon such value within the time herein provided, then the same shall be determined by arbitration in the following manner:
>
> "Not less than sixty (60) days or more than ninety (90) days prior to the beginning of each of said periods, each of the parties hereto shall select a disinterested freeholder, resident of said City of Toledo, as an arbitrator, and the two so selected shall choose a third freeholder, resident of said city, and the three so selected shall within thirty (30) days prior to the beginning of the period next thereafter succeeding, *in joint session, by a majority vote, determine and fix the fair market value of said real estate*, exclusive of the buildings and improvements thereon, and return to each of the parties hereto, in writing, signed in duplicate by any two of them, the value so determined and fixed. The value so determined and returned as aforesaid shall be binding and conclusive as to the parties hereto for the period next thereafter succeeding. And said 'Lessee' shall pay said 'Lessor' each year four (4) per cent. of said value in four (4) equal installments, in advance, on the 1st day of each of the months of August, November, February and May of each year of said period."
>
> (Lease, Pl's. Ex. 19, R. pp. 379-380)

Being unable to agree upon the value, the parties each appointed an arbitrator, and the two thus selected, being unable to agree as to a third, and the parties being likewise unable to agree as to a third, they joined, pursuant to the provisions of the lease, in an application to one of the Judges of the Common Pleas Court asking for the appointment of a third man. The arbitrator selected by petitioner was George P. Crosby, and the arbitrator selected by respondent was Al E. Reuben, both experienced Toledo real estate brokers familiar with values in the 100% retail district. The Common Pleas Judge appointed John A. Price, a Toledo attorney inexperienced in real estate and appraisal matters, as the third arbitrator.

At the time of the appointment of the arbitrators, the Presidents of the respective corporations exchanged letters (Pl's Exs. 2 to 5, R. pp. 133-135) in which they stipulated:

> "It is understood that the requirements of said lease that the three arbitrators shall be freeholders and residents of the city of Toledo have been waived by mutual consent of the parties only for the present arbitration. It is likewise understood for said purpose that the two arbitrators selected by the parties *shall not be deemed* disqualified on the ground of interest by reason of the fact that they respectively have been, or now are, representing the parties in real estate matters."

The two arbitrators had, theretofore, been managing other properties for the respective parties. Neither of them had ever had anything whatever to do with the property involved in this suit. Their handling of other properties embraced merely the collection of rentals, supervision of repairs, negotiations with tenants and other matters incidental to the care of investment property. Neither of them had authority to make leases or otherwise bind the parties. (R. p. 214.)

PROCEEDINGS OF ARBITRATORS

The arbitrators held two meetings and only two. They held no joint session; held no hearings; had no joint discussion of the factors affecting value. Mr. Price was appointed by the Common Pleas Judge as the third arbitrator on June 24, 1939. On that morning he was notified of his appointment by the attorneys for the parties, and was furnished with a copy of the joint application upon which his appointment was endorsed and with a copy of the lease. (R. pp. 126-127, 639-641.)

Acting as Chairman, Mr. Price called the other two arbitrators to his office on June 27, 1939, for their first meeting. No one else was present. They discussed only the procedure to be followed. (R. pp. 222-225, 243-246, 641-646, 677-680, 833-836, 890-896.) Mr. Price told Mr. Reuben and Mr. Crosby that he was inexperienced in real estate and appraisal matters, and requested that they give him their ideas of value and their reasons in support thereof. Mr. Crosby was ready to proceed; Mr. Reuben was not. It was then agreed among them that Mr. Crosby and Mr. Reuben, as a preliminary, should each present to Mr. Price a written statement, setting out their ideas of value and their reasons, and that after Mr. Price had the opportunity of studying these statements he should call another meeting for discussion and consideration of the matter. (R. p. 679.) Mr. Crosby stated that he could furnish his statement the next day, but Mr. Reuben said he would require about ten days to two weeks. (R. pp. 641-644.) Mr. Crosby's statement in the form of a letter (Pl's. Ex. 18, R. p. 217), together with what he called "Survey of Toledo" (Pl's. Ex. 17, R. p. 215), which he had previously prepared for the Woolworth Company, were filed with Mr. Price the next day. Mr. Reuben's written statement (Pl's. Ex. 11, R. p. 205), together with a letter (Pl's Ex. 12, R. p. 205), were delivered to Mr. Price

on July 10, 1939. Another letter (Pl's Ex. 13, R. pp. 205. 653, 654) was delivered by Mr. Reuben to Mr. Price on July 11, 1939, Mr. Price having asked him for a breakdown of his valuation. (R. pp. 641-654.)

On July 18, 1939, the second meeting was held at Mr. Price's office, Mr. Crosby having, at Mr. Price's request, returned from his vacation in Northern Michigan for the purpose. Mr. Reuben was already there. After a few minutes of personal conversation Mr. Price picked up a sheet of paper from his desk on which he had written his valuation, and announced that he had read the "briefs," had considered economic conditions, and had decided that Mr. Crosby was too high and Mr. Reuben was too low, and that he had arrived at his value of $950,000.00.* Mr. Crosby began questioning Mr. Price and told Mr. Price that he had ignored his written statement and the information which he had furnished. Mr. Reuben then said, "We are not here to argue the matter," and "I will meet that figure." Mr. Price filled in the figure of $950,000.00 in a form of award (Pl's. Ex. 9, R. p. 150) which had been prepared and delivered to Mr. Price by respondent's attorney, and Mr. Price and Mr. Reuben proceeded to sign it in a number of counterparts. Mr. Crosby refused to sign it. Mr. Price sent a counterpart of the award to each of the parties the same day by registered mail. (R. pp. 225-228, 663-666, 741-748, 845-848, 890-898.)

REQUEST FOR HEARING

Before the arbitrators met in Mr. Price's office for the preliminary meeting, Mr. Erwin R. Effler, one of petitioner's counsel, telephoned Mr. Price and stated that petitioner desired to appear and be heard by the arbitrators when

* Mr. Price testified that he considered himself an umpire and acted as such (R. p. 677). This is contrary to the terms of the lease, which called for joint deliberation and joint determination.

they were ready, and asked Mr. Price to notify him or Mr. LeRoy Eastman, Mr. Effler's partner, when the hearing would take place. Mr. Price said he would take it up with the other men when they convened, and promised to notify Mr. Effler or Mr. Eastman (R. pp. 127, 128, 144), but did not do so, for which he apologized in his testimony at the trial. (R. p. 667.)

Mr. Price further testified that he would have preferred a hearing, but that when he informed the others of Mr. Effler's telephone request, they said they could get along without the help of lawyers, and so he permitted himself to be overruled. (R. p. 692.)

CONSPIRACY AND FRAUD

The moment it was agreed among the arbitrators at the first meeting, June 27, 1939, that preliminary written statements should be filed with Mr. Price (which it was agreed should set forth the individual views of the two arbitrators appointed by the parties), Mr. Lennihan, the Vice-President of respondent, and Mr. Sanger, its Secretary and general counsel, with the aid of its Chief Statistician and its Chief Accountant, conspired together and with Mr. Reuben to influence and impose upon Mr. Price. These officers and agents of respondent assembled so-called statistical data, charts, tables and graphs purporting to show economic and trade conditions, to be incorporated in Mr. Reuben's statement. This material was partly false and fictitious, and that part which was otherwise authentic was carefully, cunningly and adroitly revised, reconstructed and "correlated" so that instead of presenting a reasonably true picture of economic conditions, it painted an entirely opposite picture—one as black and depressive as they could possibly make it. (R. pp. 408-439, 488-566.) While representing that the information came from publications of

established and recognized bureaus such as the Bulletins of the Federal Reserve Board, the Toledo Business Review, published by the University of Toledo, and the Bulletins of the Bureau of Business Research of Ohio State University, they included data, tables, etc., which are not recognized or used by those established services, but so adroitly arranged, tabulated, indexed and identified with the claimed source as to create the impression that such data constituted official and dependable indices of economic conditions. They secretly deleted or withheld data which is recognized and used by those services and which indicated favorable conditions at the time. (R. pp. 488-566.) Meetings were held by the officers of respondent above enumerated, at which this so-called statistical data was carefully reviewed. (R. pp. 461-471.) These men secretly employed, or authorized Mr. Reuben to employ, two other realtors to prepare a document which was attached to Mr. Reuben's statement to Mr. Price. (R. p. 411.) This document was falsely represented to be an appraisal of the real estate in question and an advisory opinion previously rendered by these two realtors to the Lucas County Auditor in connection with a general reappraisal for tax purposes. (Pl's. Ex. 11.) No disclosure was made to Mr. Price that these men were employed and paid by respondent. (R. p. 720.) Having collaborated and connived together to obtain this false "appraisal" and to assemble, reconstruct and "correlate" the false statistical data, Mr. Sanger, respondent's Secretary and general counsel, proceeded to draft the Reuben statement, his authorship or participation therein being carefully concealed. (R. pp. 160-212.)

Besides the false and distorted statistical matter incorporated in and attached to it, the Reuben statement also contained glaring misrepresentations which were deliberately designed to mislead the third arbitrator. The more

vicious of these misrepresentations may be briefly summarized as follows:

(a) The statement falsely showed that for the previous eight years respondent had been suffering continuing losses. (Pl's. Ex. 29, R. p. 390; Pl's. Ex. 35, R. p. 433.)

(b) It falsely showed that department stores generally can afford to pay as rent no more than 4% of their annual net sales. (R. p. 481.)

(c) It falsely showed that respondent's rental costs for the year 1938 were in excess of 4.2% of its net sales for that year. (R. pp. 567-585.)

(d) It falsely showed that respondent's lease on adjoining premises (known as the Smith & Baker property) was unprofitable and burdensome (Pl's. Ex. 29, R. p. 390; Pl's. Ex. 36, R. p. 435; Pl's. Exs. 66 to 71, R. p. 848; Pl's. Exs. 91 to 96 F, R pp. 906-912.)

(e) It falsely showed that one of respondent's competitors (The Lamson Bros. Co.) whose store is located about a block away, outside the 100% retail district but of comparable area, the land being held under 99-year lease at a ground rental of $68,250.00 net per year, was obliged to ask its landlord for relief and had succeeded in getting a reduction in its rentals of approximately 40%. (Pl's. Exs. 20, 21, 22, R. p. 440.)

All of these representations, and many others of similar import, were absolutely false and misleading as shown by the admissions of respondent's officers, by its own books and other record evidence. Mr. Price accepted the whole thing as true. He so testified (R. pp. 719-721). That he was completely misled is evident from the palpable inadequacy of the award.

Neither petitioner nor Mr. Crosby ever saw the Reuben

statement until after the award was made and until after this suit was filed, and, hence, had no opportunity to refute the false statements and misrepresentations it contained. (R. p. 738.)

Mr. Crosby adhered to the agreement of the arbitrators in letter and in spirit. He prepared his own statement in the form of a layman's letter without help from anyone.

PROCEEDINGS IN THE STATE COURTS

The award complained of was made on July 18, 1939, signed by Messrs. Price and Reuben, and was in the amount of $950,000.00. (Pl's Ex. 9, R. pp. 150, 660.) On July 29, 1939, petitioner notified respondent by letter (Pl's. Ex. 10, R. pp. 156, 157) that the arbitration was illegal and void, and that petitioner refused to be bound thereby. This suit was filed on August 7, 1939.

COMMON PLEAS COURT

The second amended petition set forth two causes of action,—the first to set aside the award because of fraud and conspiracy to impose upon and mislead the third arbitrator and because the arbitrators departed from the submission and did not accord the parties a hearing, and the second for a determination of the value of the land as a basis for the rents. (R. p. 1.)

After an extended trial, the Common Pleas Court set aside the award and determined the value of the real estate, exclusive of buildings and improvements, at $1,500,000.00. (R. p. 30.)

COURT OF APPEALS

On a trial *de novo*, substantially on the record made in the Common Pleas Court, the Court of Appeals of Lucas County, Ohio, on July 3, 1942, upheld the award of the arbitrators and entered judgment dismissing petitioner's second amended petition. (R. pp. 120, 122.) Having found against petitioner on the first cause of action, which was to set aside the award, the Court of Appeals did not consider the second cause of action. The finding of the Common Pleas Court as to the value of the land was not reviewed. (R. p. 117.)

After the Court of Appeals announced its decision and before the entry of judgment, petitioner made application, under Section 12223-30 of the Ohio General Code and Rule IX of the Rules of Practice of the Court of Appeals, for special findings of fact (R. p. 45), and submitted to the court proposed findings (R. pp. 60-106) and special written interrogatories involving the ultimate facts and the material probative facts from which the ultimate facts might be inferred. (R. pp. 47-59.) The Court of Appeals refused to answer the interrogatories (R. p. 118), and adopted verbatim the so-called findings of fact prepared by respondent's counsel, which consist of a number of general findings mixed with conclusions of law and omit the essential probative facts. (R. pp. 108-117.)

SUPREME COURT OF OHIO

Petitioner, on July 22, 1942, pursuant to Section 12223-4, General Code of Ohio, filed its written Notice of Appeal in said Court of Appeals (R. p. 122) and in the Supreme Court of Ohio (R. p. 928), thus appealing from the findings, judgment and decree of said Court of Appeals. In said notices of appeal it was stated:

> "Said appeal is on questions of law and is taken to the Supreme Court (a) in a case involving a

debatable constitutional question, and (b) on condition that a motion to certify be allowed by the Supreme Court."

Petitioner accordingly appealed as of right to the Supreme Court of Ohio on the constitutional grounds and also filed its motion for an order directing the Court of Appeals to certify the record, all pursuant to Article IV, Section 2, of the Ohio Constitution. On December 16, 1942, the Supreme Court of Ohio entered its judgment dismissing the appeal as of right on the sole ground that "no debatable constitutional question is involved" (R. p. 937), and on the same date entered its order overruling petitioner's motion to certify the record. (R. p. 937.) Application for rehearing was seasonably made, which was denied on January 6, 1943. (R. p. 938.)

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

Petitioner intends to urge each of the errors assigned in the Assignment of Errors filed in this Court as part of the Petition for Writ of *Certiorari*.

ARGUMENT AS TO FACTS AND LAW

I. THE JUDGMENT OF THE COURT OF APPEALS VIOLATES SECTION 1 OF THE FOURTEENTH AMENDMENT

1. The Judgment Upholds the Award of the Arbitrators Made Without a Hearing Being Accorded Petitioner (pp. 16 to 18 hereof).
2. The Judgment Is Based Upon Other Errors so Gross and Obvious as to Amount to Arbitrary and Capricious Action. This Is Shown by the Following:

(1) By an Examination of the Court's Opinion (pp. 19 to 29 hereof).

(2) The Court Refused to Make Findings of Fact, Including the Material Probative Facts Requested Pursuant to Section 12223-30, General Code of Ohio (pp. 29 to 31 hereof).

(3) The Court Made General Findings of Fact Mixed with Conclusions of Law, Unsupported by Any Evidence and Contrary to the Undisputed Evidence (pp. 31 to 33 hereof).

(4) The Court Ignored the Settled Rule that an Arbitrator Is Not the Agent of the Party Appointing Him and that He Owes the Parties Impartiality, Honesty and Good Faith (pp. 33 to 40 hereof).

II. THE AWARD IS ILLEGAL AND VOID

1. Grounds for Vacating Award (pp. 40 and 41 hereof).
2. Nature of Submission to Arbitrators (pp. 41 and 42 hereof).
3. A Hearing of the Parties before the Arbitrators Was Required by Law (pp. 42 to 45 hereof).
4. The Arbitrators Ignored Petitioner's Request for a Hearing (p. 46 hereof).
5. Respondent Was Given an *Ex Parte* Hearing before the Arbitrators (pp. 46 to 49 hereof).
6. Mr. Price Acted as Umpire, Not as Third Arbitrator as Required by Lease (pp. 49 and 50 hereof).
7. The Award Is Grossly and Palpably Inadequate (pp. 51 and 52 hereof).
8. The Award Is Tainted with Conspiracy and Fraud (pp. 52 and 53 hereof).
9. The Award Was the Result of Fundamental Mistakes on the Part of Mr. Price (pp. 53 to 56 hereof).

1. The Judgment Upholds the Award of the Arbitrators Made without a Hearing Being Accorded Petitioner

The court absolutely and completely disregards, ignores and nullifies the salutary rule laid down by the Supreme Court of Ohio in the case of *Worthington vs. Hewes & McCann*, 19 Ohio St. 66 (1869), that a proceeding of the character here in question is of the importance of a strict arbitration, and that the parties are not bound unless given the opportunity to be heard. The Court of Appeals thus sanctions the violation of petitioner's fundamental right. The violation of this right and the injury done to petitioner by the court's decision is quite as serious as if the court itself had refused to give petitioner a hearing.

In its findings the Court of Appeals said there was a hearing, but it will be noted that the court failed to find any probative facts and refused to answer petitioner's interrogatories directed to that issue. **There is no evidence whatever to support that finding. No one, not even the Court of Appeals, pretends that there was a hearing except through the medium of the written statements presented to Mr. Price, the third arbitrator, by Messrs. Crosby and Reuben.** This obviously was not a hearing accorded to petitioner. These written statements were intended to be merely preliminary.

The Reuben statement was framed to provide an *ex parte* hearing to respondent, because respondent's officers, accountants, statisticians and secretly employed real estate experts were permitted to testify. Mr. Crosby prepared his own statement, and at no time did petitioner have an opportunity to know or refute the evidence secretly presented by respondent through the Reuben statement.

> "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."
>
> *Brinkerhoff- Faris Trust & Savings Company vs. Hill, etc.*, 281 U. S. 673, Syllabus 3.

This Court in *Interstate Commerce Commission vs. Louisville and Nashville Railroad Co.*, 227 U. S. 88, says:

> "Administrative orders *quasi*-judicial in character are void if a hearing is denied; if the hearing granted is manifestly unfair; * * *." (P. 88.)

Proceedings of arbitrators are *quasi*-judicial in character. The requirement of a hearing is no less essential than if the proceeding is before an administrative tribunal established by law. *Ormsby Admr's vs. Bakewell*, 7 Ohio 98; *Springfield vs. Waters*, 42 Ohio St. 543; *Corrigan vs. Rockefeller*, 67 Ohio St. 354; *Worthington vs. Hewes & McCann, supra.*

In *State of Washington ex rel. Oregon Railroad and Navigation Co. vs. Fairchild et al.*, 224 U. S. 510, it is said:

> "The hearing which must precede an order taking property must not be a mere form, but one which gives the owner the right to secure and present material evidence; * * *."

In the instant case, respondent presented its evidence but petitioner was given no such opportunity, nor did it have any knowledge of the matters presented by respondent or any opportunity to refute the same.

The due process of law guaranteed by the Fourteenth Amendment has regard to the substance of right and not to matters of form or procedure. *Chicago B. & Q. R. Co. vs. Chicago*, 116 U. S. 226; *Frank vs. Mangum*, 237 U. S. 309.

The essential elements of due process are notice and opportunity to defend. *Simon vs. Kraft*, 182 U. S. 427; *Orchard vs. Alexander*, 157 U. S. 372; *Twining vs. New Jersey*, 211 U. S. 78; *Jacob vs. Roberts*, 223 U. S. 261; *Garfield vs. United States*, 211 U. S. 249; *Scott vs McNeal*, 154 U. S. 34.

In *Brown vs. Lyddy*, (N. Y., 1877) 11 Hun. 451, there was involved a lease containing a privilege of renewal,

and providing that if the parties were unable to agree upon the rent, the value of the land was to be ascertained by appraisers, and that 5% of the value so ascertained should be paid as rent. It was claimed by one of the parties that he had been deprived of a hearing by the appraisers. In its opinion the court says:

> "* * * The right of the parties to a hearing, and to produce witnesses, is one of the established privileges (*Elmendorf vs. Harris,* 23 Wend. 628), * * *."

In view of the fact that the *Worthington* case, *supra,* represented the settled law of Ohio at the time our lease was executed, and thus became an integral part of the lease contract, we believe that *Muhlker vs. New York and Harlem Railroad Co.,* (1905) 197 U. S. 544, is strongly in point here. Paragraphs 2 and 3 of the syllabus are as follows:

> "The *Elevated Railroad* cases, decided by the Court of Appeals, established the law of the State of New York to be that the easement of light and air of abutting property owners in the streets of New York above the street to be property and within the protection of the Constitution for compensation in case of its diminution by an elevated railroad structure.
>
> "Such decisions assured to purchasers of property, abutting on streets the beds whereof had been deeded to the City of New York in trust for streets, that their easements of light and air were secured by contract and could not be taken from them without compensation; and the courts of that state cannot change or modify their decisions so as to take away rights which have been acquired by contract and are within the protection of the Federal Constitution."

We refer the Court to further discussion of this point and of the *Worthington* case at pp. 42 to 45 hereof.

2. The Judgment Is Based Upon Other Errors so Gross and Obvious as to Amount to Arbitrary and Capricious Action. This Is Shown by the Following:

(1) Errors of the Court as Shown by an Examination of Its Opinion

It is well settled that gross and obvious errors coming close to the boundary of arbitrary action constitutes a denial of due process. *Roberts, Receiver, vs. New York,* 295 U. S. 264; *Truax vs. Corrigan,* 257 U. S. 312; *Chicago Life Insurance Co. vs. Cherry,* 244 U. S. 25; *American Railway Express vs Kentucky,* 273 U. S. 269; *Pennoyer vs. Neff,* 95 U. S. 714; *Booth vs. Illinois,* 184 U. S. 425.

> "A finding without evidence is arbitrary and useless, * * *."
>
> *Interstate Commerce Commission vs. Louisville and Nashville Railroad Co.,* 227 U. S. 88.

As appears from the same case, this is likewise true if the finding is contrary to the "indisputable character of the evidence," (citing *Tang Tun vs. Edsell,* 223 U. S. 673, 681; *Chin Yoh vs. United States,* 208 U. S. 8, 13; *Loh Wah Suey vs. Backus,* 225 U. S. 460, 468; *Zakonaite vs. Wolf,* 226 U. S. 272); or if the facts found do not, as a matter of law, support the order made (citing *United States vs. B. & O. S. W. R. R.,* 226 U. S. 14; *Cf. Atlantic C. L. vs. North Carolina Corp. Com.,* 206 U. S. 1, 20; *Wisconsin, M. & P. R. Co. vs. Jacobson,* 179 U. S. 287, 301; *Oregon Railroad vs. Fairchild,* 224 U. S. 510; *I. C. C. vs. Illinois Central,* 215 U. S. 452, 470; *Southern Pacific Co. vs. Interstate Com. Comm.,* 219 U. S. 433; *Muser vs. Magone,* 155 U. S. 240, 247.

The Court of Appeals, as shown by its opinion, was flagrantly wrong in each of the following respects:

(a) In holding that by the stipulation of the parties

> "that the two arbitrators selected by the parties shall not be deemed disqualified on the ground of interest by reason of the fact that they respectively have been, or now are, representing the parties in real estate matters,"

and by the appointment of the two real estate brokers referred to, the parties

> "materially departed from and modified the scheme provided for in the lease"
>
> (Opinion, Appendix, p. 64),

whereas the stipulation was not a waiver of disinterestedness but obviously was and was intended to be a mere acknowledgment that the relationship of the parties to the appraisers appointed by them did not disqualify them as a matter of law and should not be a ground of challenge.

This holding, we submit, is the **key error** from which all the other errors stem. The matter quoted by the Court of Appeals is part of the last sentence in the second paragraph of the letter of June 1, 1939 (Pl's Ex. 3). The entire paragraph is as follows:

> "It is understood that the requirements of said lease that the three arbitrators shall be freeholders and residents of the City of Toledo have been waived by mutual consent of the parties only for the present arbitration. It is likewise understood for said purpose that the two arbitrators selected by the parties shall not be deemed disqualified on the ground of interest by reason of the fact that they respectively have been, or now are, representing the parties in real estate matters."

This letter was one of the four letters (Pl's Exs. 2, 3, 4 and 5) exchanged by the presidents of the parties at the time they selected the two arbitrators or appraisers. (These letters are set out at pages 65-67 of the record.) These letters constituted the entire transactions on the subject. There was no other understanding. All that was said or intended by the last sentence of this stipulation was that the mere fact that the arbitrators bore such relationship

to the parties was no disqualification in law, and that there should be no challenge on that ground. There was no waiver as to the requirement of disinterestedness. On the contrary, the wording shows a studious regard for that phase of the matter and a sharp determination to avoid such a waiver. Neither party has ever contended that, by this stipulation and the appointment of Messrs. Crosby and Reuben, the parties in any way departed from or modified the lease. That idea originated with the Court of Appeals.

Thus, the Court of Appeals made this whole case turn on the construction and, we respectfully submit, **the distortion of a single sentence.** It is perfectly obvious that if the parties had intended a waiver as to disinterestedness, they would not have gone to the trouble of using two sentences in the paragraph above quoted, but would undoubtedly have disposed of the whole matter in one sentence.

By the last sentence of Pl's Ex. 3, the parties recognize that the two arbitrators were not interested simply because of their relationships to the parties. The Court of Appeals determines this as meaning **quite the opposite,** namely, that the parties recognize that these two arbitrators are interested and that the parties are expecting them to act as partisans, as representatives, as agents and with full bias and prejudice.

Attention has already been called to the fact (see "Statement of Case") that neither of these arbitrators ever had anything to do with the property in question, and that their authority in other matters was extremely limited, and that neither of them had any known financial interest or other relationship to the parties which would disqualify them. Later in this brief (pp. 33 to 40) it will be shown that it is **settled law** that relationships, such as Messrs. Reuben and Crosby bore to the parties, are no disqualification as a matter of law; also that arbitrators or appraisers, **however their duty has been devolved upon them,** owe to

the parties complete impartiality, fairness and good faith, and that an arbitration or appraisal once entered upon must be conducted in absolute good faith.

It is evident from the opinion that the Court of Appeals sustained this unconscionable award in the face of the admitted facts—that there was no hearing, no joint session, no deliberative proceeding by the arbitrators, the third man acting as umpire—and condoned all the misrepresentations, fraud and chicanery of Mr. Reuben and respondent, because the court took the view that the requirements of the lease as to hearing, joint session and joint determination, and fair, unbiased action by the arbitrators had been wiped out through modification of its terms, so that Messrs. Crosby and Reuben became mere advocates of the parties instead of arbitrators, as the lease required.

(b) In assuming that the officers and attorneys of the parties had the inherent power and authority to bind the parties, both corporations, to a material departure from and modification of the provisions of the 99-year lease.

The Court of Appeals, in support of its position with respect to Pl's. Ex. 3, just discussed, calls attention to the joint application to the Common Pleas Judge for the appointment of the third arbitrator (Pl's Ex. 6, R. p. 139). This application was signed only by the attorneys for the parties. In that application was the recital:

> "The parties have duly waived any objection to said two arbitrators on the ground of interest, freeholding or place of residence."

This was a mere recital and inadvertently and loosely referred to in the letters above mentioned. (Pl's. Exs. 2, 3, 4 and 5.) It was not intended or understood to be anything more. The attorneys could not enlarge the stipulation which the presidents of the two corporations had made and they had no thought of doing so.

A 99-year lease is one of the most solemn instruments

known to the law. The lease involved in this case covered property of great value and the arbitration was to determine the amount of rent for a 10-year period. A modification of such an instrument under such circumstances cannot be lightly considered. It can be shown only in writing by express terms or "by such clear and concise evidence as to leave no reasonable doubt about it." *Northern Assurance Co. vs. Kehoe,* 24 C. C. N. S. 465; *Ashley vs. Henahan,* 56 Ohio St. 559; *Union Central Life Insurance Co. vs. Hook,* 62 Ohio St. 256. See also *Brown vs. Lyddy,* 11 Hun. 451 (*Supra*), where the court says:

> "The right of the parties to a hearing, and to produce witnesses, is one of the established privileges (*Elmendorf vs. Harris,* 23 Wend. 628), although it may be waived by them. The courts would not declare that such a right did not exist, unless the terms of the submission so provided, or a waiver, was clearly demonstrated. * * *." (P. 456.)

We submit that the letters (Pl's. Exs. 2, 3, 4 and 5) did not by their terms, and were not intended, to constitute a waiver as to disinterestedness of the two arbitrators.

In view of the position taken by the Court of Appeals, we are confronted with the question, by what authority was the lease modified? The record is silent as to any action of the Board of Directors of either petitioner or respondent. The charters of these corporations and their codes of regulations and by-laws are not in evidence. The record is silent as to any prior course of dealing.

The law with respect to the authority of officers and agents of a corporation is stated in *2 Fletcher Cyclopedia Corporations, Permanent Edition,* Section 434, page 228, as follows:

> "* * * The president, treasurer, secretary and other officers of a corporation are merely its agents, appointed by the stockholders or the board of directors or trustees, and vested with such powers, and such powers only, as may be conferred upon them by

> the corporation, subject, of course, to any express charter or statutory provisions. Their power to bind the corporation is determined by the extent of the authority expressly or impliedly conferred upon them by resolution of the stockholders or directors by the by-laws of the corporation, or otherwise, and by application of the general principles governing the relation of principal and agent. The general rule is that the officers and agents of a corporation, like the agents of a natural person, have such authority only as has been conferred upon them by their principal, the corporation; and contracts or acts in excess of their authority will not bind the corporation, in the absence of estoppel or ratification. All of the authorities agree that a corporation is not bound by the acts of its agents not within the scope of their authority. * * *"

See also *10 Ohio Jurisprudence,* Section 531, page 720; Section 548, page 744.

The law of Ohio has been laid down by the Supreme Court of Ohio to the effect that, in the absence of express authority conferred upon its officers and agents or of such a course of dealing with the other party as clearly implies authority, a corporation can be bound only by its board of directors.

The leading case in Ohio on this subject is *Bradford Belting Co. vs. Gibson,* 68 Ohio St. 442. That case dealt with a contract to erect a factory building on a lot in Cincinnati and after its completion to execute a 99-year lease of the property to defendant, in consideration of which the defendant agreed to accept the lease and to pay certain rental. Plaintiffs proceeded with the building work, and before the same was completed an officer of the defendant-corporation notified plaintiffs to stop the work and that his company would not enter into the lease. Plaintiffs did stop the work and brought suit and attempted to prove an anticipatory breach of the contract based upon the state-

ment of the officer of the defendant-corporation. The court held in the fourth syllabus as follows:

> "4. It is error to instruct the jury that if the secretary did make such statements that would be *prima facie* evidence that the directors had so decided, and the plaintiff would be authorized to consider that he had spoken by authority of the board of directors; and that if the jury should find that the secretary did make such statements, the burden of proof would be upon defendant to show that the secretary had acted without the authority of the board of directors."

The Bradford Belting Co. case was cited with approval in *Kroeger, Superintendent of Building and Loan Associations, et al. vs. Brody, Trustee,* 130 Ohio St. 559, in which the court quoted from the New Jersey case of *Myrtle Avenue Corp. vs. Mt. Prospect,* 112 N. J. L. 60, 169 A. 707:

> " 'A corporation is bound by the act of its president only to the extent that the power to do the act has been conferred upon him expressly by the charter, by-laws or corporate action of its stockholders or board of directors, or can be implied from the powers expressly conferred, or which are incidental thereto, or where the act is within the apparent powers which the corporation has caused those with whom the president has dealt to believe it has conferred upon him.' " (P. 564.)

The *Brody* case was cited with approval in *State ex rel. Squire, Superintendent of Banks, vs. Frasier et al.,* 133 Ohio St. 283.

In view of these holdings, there is no basis whatever for the view taken by the Court of Appeals that the lease was modified. Clearly, Messrs. Wilcox and Eppstein did not have the power and authority to throw over their shoulders the important requirements of the lease that the value should be determined by disinterested arbitrators in joint session and by deliberative process, after a full hearing before the arbitrators, which the lease contemplated. No

one, unless it was Mr. Price, even dreamed that he would assume the role of umpire.

(c) In holding that the stipulation of the parties and the selection of the two arbitrators constituted these men

> "their respective representatives on the board of appraisers"
>
> (Opinion, Appendix, p. 64),

whereas the law clearly is that arbitrators so appointed are not the respective representatives and agents of the parties appointing them, and that arbitrators, regardless of how their duties have been devolved upon them, owe both parties the duty of fairness, honesty and good faith.

(d) In holding that the stipulation and the selection of the two arbitrators

> "robbed the appraisal of the deliberate character the lease contemplated"
>
> (Opinion, Appendix, p. 64),

whereas the lease requires that the value shall be

> "determined and fixed * * * in joint session,"

which certainly calls for an intelligent inquiry, joint deliberation, free and full debate, and joint judgment.

(e) In holding that the stipulation and the selection of the two arbitrators

> "in effect, made the third man an umpire"
>
> (Opinion, Appendix, p. 64),

whereas the lease makes him a joint arbitrator and requires the valuation to be determined in joint session by majority vote.

(f) In holding that the two arbitrators appointed by the parties had power as representatives and agents of the respective parties, in conjunction with the third arbitrator, to deny the parties a hearing, and indeed to refuse the request of petitioner for a hearing, notwithstanding the rule declared by the Ohio Supreme Court that:

"When it is reasonably practicable, an opportunity should be given the parties to be heard by the appraisers, before making their valuation; otherwise it will not be binding upon the party deprived of such opportunity."

5th Syl., *Worthington vs. Hewes & McCann*, 19 Ohio St. 66.

(g) In holding that the parties were actually accorded a hearing in that

"The two interested appraisers representing their clients presented their respective evidence and arguments in their briefs."

(Opinion, Appendix, p. 65.)

This amazing holding is made in the face of the fact that neither arbitrator appointed by the parties had the slightest notion of, or opportunity of knowing what considerations or alleged facts or arguments the other was urging upon the third arbitrator, and in the face of the fact that what was intended by all the arbitrators as a mere preliminary procedure for the education of the third arbitrator was converted by the conduct of the third arbitrator and of the lessee-appointed arbitrator into a finality, foreclosing any discussion, debate, or deliberation in joint session.

(h) In disregarding the fact that the submission of the written statements to the third arbitrator was understood by all of the arbitrators, as shown by their undisputed testimony, to be only a preliminary step, and was not intended to dispense with or foreclose full discussions and joint debate later. The court's grave oversight in this respect is shown by its statement as follows:

"If this were to be a deliberative process, the representative appraisers should and would have exchanged copies of their briefs."

(Opinion, Appendix, p. 64.)

The fact is that the lessor-appointed arbitrator prepared and submitted his writing to the third arbitrator at once,

while the lessee-appointed arbitrator took about two weeks. Under the circumstances, the lessor-appointed arbitrator asked the third arbitrator to treat his writing as confidential for the time being. Neither writing was disclosed by the third arbitrator throughout the arbitration proceeding, because, as above indicated, the proceeding never reached the discussion stage. When the arbitrators met for what they supposed was to be a "joint session," the third arbitrator announced his decision as to value; the lessor-appointed arbitrator began to protest; the lessee-appointed arbitrator interposed, saying, "We are not here to argue the matter," and that he would meet the figure stated.

(i) In holding that the proceedings of the arbitrators

> "met the requirements of the lease as expressly modified by the parties, * * *."
>
> (Opinion, Appendix, p. 65);

whereas, there was no modification of the lease; no one had authority to modify it, or the slightest intention of doing so. If petitioner had any thought that the lease was modified and a hearing waived, why would its counsel expressly ask for a hearing or notify Mr. Price of its readiness to appear at the convenience of the arbitrators?

(j) In lightly absolving respondent, its officers, its counsel, and the arbitrator appointed by respondent, from the very serious charges contained in the second amended petition, though they stand convicted on the record by the undisputed evidence, and indeed, by their own admissions. The Court of Appeals excuses the most reprehensible and successful efforts to tamper with and improperly influence the arbitration and the most shocking falsehoods and distortions of fact, with the light statement that,

> "each representative appraiser was only 'putting his (or his client's) best foot forward.' "
>
> (Opinion, Appendix, p. 65.)

Thus did the court put its seal of approval on conduct abhorrent to equity and good morals.

The action of the Court of Appeals in giving its sanction to and in upholding the unconscionable award made without a hearing being accorded petitioner, is a denial of due process, and the other errors of the Court of Appeals are so flagrant as to be arbitrary and capricious exercise of power, in clear conflict with due process.

2. **The Court Refused to Make Findings of Fact, Including the Material Probative Facts Requested Pursuant to Section 12223-30, General Code of Ohio**

Section 12223-30 of the Ohio General Code is as follows:

> "**Court shall state on record facts upon which error arises.** On application of a party objecting to a ruling or decision of the Court of Appeals during the trial, or on motion for a new trial, such court shall find from the evidence and state on the record the facts upon which the alleged error arises, or which may be material in determining whether or not error has intervened."

It will be noted that Section 12223-30 requires the court to find not only "the facts upon which the alleged error arises," but also the facts "which may be material in determining whether or not error has intervened."

If the court may satisfy the requirements of this statute merely by a series of general findings of ultimate facts, as was done in this case, then the request of petitioner was an idle gesture and the statute is a dead letter. The spirit and purpose of the statutory provisions is to require the court to find all the material facts to enable the reviewing court to determine whether or not the decision is erroneous.

We refer the Court to the findings of fact prepared and submitted by petitioner, pursuant to the statute and Rule

IX, at pages 60-106 of the record, and to the interrogatories at pages 47-60 of the record, and ask the Court to compare the same with the so-called findings adopted by the Court of Appeals at pages 107-117 of the record.

The Supreme Court of Ohio has not had occasion to interpret Section 12223-30 with respect to the point under discussion; but it has had occasion to interpret a kindred statute relating to trials in the Common Pleas Courts of Ohio. The kindred statute referred to is Section 11421-2, General Code of Ohio, which is as follows:

> "**Findings when case tried by court.** When questions of fact are tried by the court, its findings may be general for the plaintiff or defendant, unless, with a view of excepting to the court's decision upon questions of law involved in the trial, one of the parties so requests, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law."

In *Cleveland Produce Co. vs. Dennert*, 104 Ohio St. 149, the Supreme Court of Ohio held that the provisions of Section 11421-2, General Code, (then Section 11470) confer a substantial right and are mandatory; and that where questions of fact are tried by the court, the refusal of a request for special findings and the refusal to answer interrogatories involving probative facts is reversible error. The syllabus of that case is as follows:

> "The provisions of Section 11470, General Code, confer a substantial right and are mandatory, and where questions of fact are tried by the court without the intervention of a jury, and one of the parties with a view of excepting to the court's decision upon questions of law involved in the trial requests a separate written statement of the conclusions of fact, and as an aid to the court submits special written interrogatories for such purpose, it is the duty of the court as a part of its judgment to make answer to all interrogatories involving the ultimate facts of the controversy, and to all involving probative facts

from which the ultimate facts can be inferred as a matter of law and its failure to do so is reversible error."

The *Dennert* case was followed in the case of *Levict et al., Appellant, vs. Bonnell, Appellee,* 137 Ohio St., 453. See also *Oxford Township vs. Columbia,* 38 Ohio St. 87; *Cleveland & Toledo Railroad Co. vs. Johnson & Kellogg,* 10 Ohio St. 591.

As above noted, the *Dennert* case dealt with a trial in the Common Pleas Court while the *Levick* case dealt with a trial in the Municipal Court; yet, where the Court of Appeals is the trier of the facts, as in this case, the reasoning of the *Dennert* case is equally applicable and the court was required not only to find the material probative facts but also to answer interrogatories. We submit that that is the purpose and intent of Section 12223-30, which is a part of the Appellate Procedure Act of Ohio.

3. **The Court Made General Findings of Fact Mixed with Conclusions of Law, Unsupported by Any Evidence and Contrary to the Undisputed Evidence**

The Court's attention is called to fundamental matters as to which the findings of the Court of Appeals are not supported by any evidence or are contrary to the admitted or undisputed evidence:

In finding No. 15 (R. p. 116) the Court of Appeals found "that the parties did have a hearing." There is no evidence whatever to support this finding.

In finding No. 12 (R. p. 116) the Court of Appeals found that "the appraisers did in joint session by a majority vote determine and fix the fair market value * * *." **The undisputed evidence is to the contrary.** There was no joint session. There was never any discussion, debate or joint deliberation concerning the

factors affecting value, as the lease expressly required.

In finding No. 10 (R. p. 115) the Court of Appeals found that "on June 27, 1939, the appraisers thus appointed met and discussed the fair market value of said land exclusive of buildings and improvements and the method or procedure to be followed by them in the appraisal of said land." **The undisputed evidence is directly to the contrary.** All three appraisers, who were the only persons present at said meeting of June 27, 1939, testified that there was no discussion of the fair market value of the land at that meeting. There was no such discussion at the other meeting held by them on July 18, 1939.

In finding No. 6 (R. p. 115) the Court of Appeals found "* * * the parties agreed to waive and did waive so far as these two appraisers were concerned, the requirements of the lease that the appraisers be disinterested freeholders * * *."

As to this finding, we respectfully refer the court to the discussion under (a) commencing at page 19 of this brief. It is equally applicable here and need not be repeated.

In finding No. 18 (R. p. 117) the Court of Appeals found "that the appraisal as made is in accordance with the lease as modified, changed and interpreted by the parties."

As to this finding, we respectfully refer the court to the discussion under (b) commencing at page 22 of this brief. It is equally applicable here and need not be repeated.

The finding and decision of the Court of Appeals amounts to a ruling that the parties modified this 99-year lease by inadvertence and contrary to any express or implied authority on the part of the officers who acted for the corporations.

By its finding No. 15 (R. p. 116) the Court of Appeals found "that the appraisal was made fairly and was free from fraud, conspiracy, misrepresentations or irregularities."

These general findings are in the face of the undisputed testimony and matters of record showing the glaring falsehoods, misrepresentations and concealments contained in the written statement prepared by Mr. Sanger and palmed off on the third arbitrator, Mr. Price, by Mr. Reuben (Exhibit No. 11).

4. The Court Ignored the Settled Rule that an Arbitrator Is Not the Agent of the Party Appointing Him and that He Owes the Parties Impartiality, Honesty and Good Faith

In a desperate effort to escape the damaging case against them, respondent's counsel were forced in the courts below to resort to false and artificial arguments. They kept insisting that in arbitrations and appraisals generally the person appointed by each party is, and is intended to be, his agent and representative. Unfortunately the Court of Appeals was misled. The court not only adopted this view, but also went so far as to hold that the lease was modified, the joint session and deliberative process required was eliminated, a hearing was waived and Mr. Price became the umpire.

Neither the facts nor the law support these views. Indeed, if the position taken by the court were sound, then a valid award could have been made by Mr. Price alone, and the concurrence of Mr. Reuben in the award was unnecessary. In the view of the court, Messrs. Crosby and Reuben never were arbitrators, but were merely the representatives and advocates of the parties who appointed them.

The court even condoned the fraud and misrepresentation practiced by Mr. Reuben and respondent, on the theory that Mr. Reuben, as agent of respondent, was merely "putting his (or his client's) best foot forward." We respectfully contend that the position is wholly false.

The 9th syllabus in *Sholz vs. Mills,* 176 Mo. App. 352, is as follows:

> "9. The fact that an appraiser appointed under a lease to appraise land for the purpose of fixing the rent mistakenly thought that he represented the party to the lease at whose instance he was appointed when it was his duty to act impartially, irrespective of the interest of any party, was ground for setting aside the appraisement."

In *3 American Jurisprudence,* pages 915-916, we read as follows:

> "§84. The authority of arbitrators differs from that of agents. On occasion, it is true, they have been regarded as agents of the parties, in the sense that their authority to determine the disputed matters is derived from the parties, at common law is subject to revocation at any time prior to the award, and, if exceeded, may nevertheless be confirmed by subsequent ratification of the parties. This view has been justly criticized on the grounds that their position, once they are appointed, is judicial in nature, that they are not subject to the direction and control of either party or to the general rules with respect to agents, and that the right to revoke their authority may be justified by reasons of public policy."

Note 5 of the text just quoted from *American Jurisprudence* refers to many cases, and quotes the following from one of them:

> " 'Arbitrators are, in no proper sense of the term, agents. * * * To call an arbitrator an agent is an egregious misnomer, and any attempt to apply to arbitration the rules pertaining to agency is farfetched and impractical.' (*Martin vs. Vansant,* 99

Wash. 106, 168 P. 990, Ann. Cas. 1918D, 1147.) They are not agents in law and ought not to be in practice. If they were subject to the direction of the parties, the whole proceeding would be a useless ceremony, for if the parties cannot agree by direct negotiation—and the arbitration clause is operative only in case of disagreement—they cannot agree through agents subject to their direction. (*Norwich Union F. Ins. Soc. vs. Cohn* (C. C. A. 10th) 68 F. (2d) 42, 94 A. L. R. 494, writ of *certiorari* denied in 291 U. S. 665, 78 L. Ed. 1056, 54 S. Ct. 440.)" (P. 916.)

See also *14 R. C. L.*, p. 1360.

Good faith and honest conduct go to the heart of every arbitration or appraisal.

In the case of *Insurance Company vs. Carnahan*, 63 O. S. 268, the Supreme Court of Ohio says, at page 273:

"* * * Good faith is required of both parties in the conduct of arbitration or appraisement when once entered upon; * * *."

In *Produce Refrigerating Co. vs. Norwich Union Fire Insurance Society et al.*, 91 Minn. 210 (1904), the court, at pages 213-214, speaks as follows:

"* * * The board of arbitrators is a *quasi* court, governed by rules applicable to common law arbitration, and should constitute a body of disinterested men, whose business it is to proceed in a judicial and impartial manner to ascertain the facts in controversy, **without regard to the manner in which the duty has been devolved upon them.** *Levine vs. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855; *Christianson vs. Norwich Union Fire Ins. Soc.*, 84 Minn. 526, 88 N. W. 16. **Arbitrators not avowedly selected as partisians, are, indeed, bound, as in the execution of a joint trust, to look impartially** at the true merits of the matter submitted to their judgment. *Morville vs. American*, 123 Mass. 129. An arbtiration is a judicial proceeding, and the arbitrators, being alike the agents of both parties, and not of one party alone, are bound to exercise a high degree of judicial

> impartiality, **without the slightest regard to the manner in which the duty has been devolved upon them.** *Grosvenor vs. Flint,* 20 R. I. 21, 37 Atl. 304.
>
> "But while neither natural nor legal disabilities hinder a person from being an arbitrator, provided the fact is known to the parties at the time of the submission, still, as he is the agent of both parties alike, and impartiality is the fundamental requisite, the **court closely scrutinizes the action of an arbitrator whose relation to one of the parties was such as to naturally influence the judgment even of an honest man.** *Sweet vs. Morrison,* 116 N. Y. 19, 22 N. E. 276. * * *"

It will be noted that, while the notion of agency appears in the *Rhode Island* case and in the *New York* case referred to in the foregoing quotation, the effect of agency is entirely eliminated by reason of the fact that the arbitrators are treated as the "agents of both parties, and not of one party alone." It will be seen also that the arbitrators are bound to exercise a high degree of impartiality, **"without the slightest regard to the manner in which the duty has been devolved upon them."**

In view of the wholly false contentions of opposing counsel and of the resulting grave error of the Court of Appeals with respect to the so-called waiver as to disinterestedness of the appraisers, we think this Court will find it very helpful to note the Annotation in *104 A. L. R.,* commencing at page 563. While the Annotation deals with insurance appraisers, the principle is equally applicable here. It there appears that the **mere fact that one appointed by the insurer as an appraiser or arbitrator to determine the amount of the loss under an insurance policy on property has acted in a similar capacity on other occasions for the insurer, or that a person selected by the insured as appraiser has previously thereto, at the instance of the insured, made a computation of the loss, does not, as a matter of law, disqualify such appraiser.** The following are ex-

amples of cases to which the Annotation refers in this connection:

"In *Levin vs. Northwestern Nat. Ins. Co.,* (1911; C. C.) 185 F. 981, it was held that the arbitrator appointed by the insurer was not disqualified because he had previously been selected by insurers, and in some instances by the defendant company, to act in similar cases, **there being no evidence to impugn his honesty or integrity,** or to show that he acted improperly in making the award or had any interest in the result; and it appearing that he was a contractor of large experience, well acquainted with the cost of the building and building materials, and that he had acted as appraiser for the insured in some cases, as well as for the insurer in others. The court stated that **the fact that he had previously acted as an appraiser spoke for his competency to act in such capacity, rather than against it.**" (P. 564.)

"In *Northern Assur. Co. vs. Melinsky,* (1927) 237 Mich. 665, 213 N. W. 70, it was held that the fact that one had acted as appraiser for the plaintiff insurance company and other insurers at the request of plaintiff's adjuster did not render him ineligible subsequently to act as an appraiser for the plaintiff insurance company.

"That appraisers chosen have frequently acted in other insurance disputes is no disqualification, nor evidence of bias or prejudice. *McQuaid Market House Co. vs. Home Ins. Co.,* (1920) 147 Minn. 254, 180 N. W. 97.

"To disqualify, there must be shown some act or acts of misconduct prejudicial to the interests of the party complaining. *Ibid.*" (P. 564.)

"In *American Cent. Ins. Co. vs. Terry,* (1927; Tex. Civ. App.) 298 S. W. 658, where the suggestion was made by insured that the appraiser for the insurance company was not an impartial and nonpartisan person, suitable for selection in the first instance, in that he had been selected by the company as its appraiser many times before and in the cases had consistently served with partiality and bias in making awards of amount of damage, the court observed that, even if true, this fact alone **would not necessarily or properly be inconsistent with his im-**

partiality in the present case, in the absence of some act or conduct tending to exhibit his serving the company's interest as a partisan would." (P. 565.)

"In *Christianson vs. Norwich Union F. Ins. Soc.*, (1901) 84 Minn. 526, 88 N. W. 16, 87 Am. St. Rep. 379, it was held that a person did not assume the consequences of irregularities and misconduct on the part of a referee merely because it was known to the former that the appraiser was a professional referee on behalf of the interests of the opposite party." (P. 566.)

In the same Annotation, page 566, under the heading "Prior service of appraiser as evidence of interest or bias," we read the following:

"In the cases already considered, the courts, while taking the view that prior service by the appraiser would not disqualify him as matter of law, may be regarded as, in general, not opposed to the proposition that such evidence may be considered in passing on the question of bias or interest. See in this connection particularly *Cohen vs. Atlas Assur. Co.*, (1914) 163 App. Div. 381, 148 N. Y. S. 563, and *McQuaid Market House Co. vs. Home Ins. Co.*, (1920) 147 Minn. 254, 180 N. W. 97, *supra.*"

In the same Annotation, page 567, under the heading "Previous service together with other circumstances held to disqualify; amount or nature of such service," there is an interesting collection of cases. The following is quoted from page 570 as an example:

"The fact that the company insured, which sought to have an award of appraisers set aside on the ground that one of the appraisers was disqualified because he was not disinterested but was biased in favor of the insurance company appointing him, knew that the appraiser so appointed had often served in that capacity for the insurer, would not preclude the insured from having the award set aside, where there was nothing to indicate that the insured had any reason to suspect that such appraiser's experience would cause him to be other-

> **wise than just and fair in his decision,** and in addition, the representatives of the insured were assured by persistent and positive statements by the insurer that the appraiser was a conscientious and just person in the settlement of such disputes, and, the experience of insured with him being limited, it was justified in accepting the assertion as true. *Ibid.*" (*Produce Refrigerating Co. vs. Norwich Union F. Ins. Co.*, (1904) 91 Minn. 217, 97 N. W. 875, 98 N. W. 100 (affirmed on reargument in (1904) 91 Minn. 210, 98 N. W. 100).)

At page 571 of the Annotation, there is the heading "Where both insurer and insured have friendly appraisers." We quote from what is said with reference to *Remington Paper Co. vs. London Assur. Corp.*:

> "And in *Remington Paper Co. vs. London Assur. Corp.*, (1896) 12 App. Div. 218, 43 N. Y. S. 431, it was held that the fact that an arbitrator designated by the insurance company had been frequently employed by such company and other insurance companies to appraise losses occasioned by fires would not, in and of itself, show partiality so as to justify setting aside the award of the arbitrators, particularly in view of the fact that the arbitrator appointed by the insured was concededly friendly to, and was at the time of the appraisal, in the employment of insured, **and both arbitrators acted competently and fairly and agreed on the appraisal,** so that the services of the umpire were not needed or called for." (Pp. 571-572.)

In closing the discussion under this head, we call attention to the fact that, even in cases where by the terms of the contract questions relating to its execution are left to the decision of an agent or employee of one of the parties, the law strictly insists on impartiality, honesty and good faith. This is illustrated by the host of cases involving building or construction contracts, where the decision is left to an architect, engineer or superintendent employed by one of the parties. Cases of this type are dealt with in

Annotations appearing in *54 A. L. R.* 1255, and *110 A. L. R.* 137. On page 143 of the latter Annotation, we read:

> "As stated in the earlier annotation, notwithstanding a contract makes the certificate, report, opinion, or decision of an engineer or architect conclusive on the parties, the law writes into this provision that the conduct of the arbiter must be free from fraud. Fraud on his part destroys the effect of the provision. Therefore, if the architect or engineer fails honestly to exercise his judgment, or makes such gross mistakes as to imply bad faith, his decision, report, certificate, or opinion is not binding on the parties to the contract. * * *"

Mr. Reuben was no more relieved of his obligation to act fairly and impartially than would be a judge who was called upon to hear a case involving a former client under similar circumstances. The situation is comparable to that where a litigant waives a challenge for cause and accepts as a juror a person who has been identified with the adverse party in some similar capacity. Such juror would not thereby be relieved of the duty to act honestly, fairly and impartially. The claim of agency is without foundation in law or in morals. Under no ethical or legal concept were Mr. Reuben or respondent excused from the exercise of the simple rules of **honesty and good faith** toward both Mr. Price and petitioner.

II. THE AWARD IS ILLEGAL AND VOID

1. Grounds for Vacating Award

By way of preface to this discussion, we quote the following from *3 American Jurisprudence*:

> §139. "Since a party to an arbitration proceeding has a right to the judgment of disinterested and honest men, it is the rule that collusion between an arbitrator and the party benefited is ground for impeachment of an award. * * *" (P. 962.)
>
> §140. " * * * The general rule is that an award may be impeached for fraud, improper conduct, or

unfair means employed by the successful party in procuring it. * * * in such cases the award will be set aside on proof of the improper conduct, irrespective of whether or not the arbitrators were actually influenced thereby in making the award. * * * "
(Pp. 962-963.)

§142. "* * *

"Gross inadequacy or exorbitance in an award has been considered to indicate either fraud, or such neglect and carelessness as to constitute misconduct on the part of the arbitrators. * * *" (Pp. 964 965.)

The following is quoted from *Pomeroy's Equity Jurisprudence,* 5th Edition, 1941, Vol. 3, page 610:

" * * * Proper grounds for avoiding an award include fraudulent concealment of material matters, positive evidence of fraud or collusion on the part of the arbitrators, and the secret or private communication by one of the parties with the arbitrators, where the communication was with an apparent intent to gain an unfair advantage. * * * "

The following is quoted from *Ice Service Company vs. Phipps' Estate,* 245 N. Y. 393, 157 N. E. 506 (1927):

"* * * The parties have made the appraisers the judges—the court of last resort—**unless they have mistaken their authority, departed from the submismission, clearly misconceived their duties, acted upon some fundamental and apparent mistake or have been moved by fraud or bias.**"

2. Nature of Submission to Arbitrators

Throughout the lease the proceeding of the appointees is called an "arbitration" and the appointees are uniformly called "arbitrator" or "arbitrators." We shall use these words for the most part in the same way.

The proceeding is an appraisal, but one "akin to an arbitration" as was said in *Van Cortlandt vs. Underhill,* 17 Johnson (N. Y.) 405, and "in the nature of an arbitration,"

as was said in *Janney, S. & Co., vs. Goehringer* (1893), 52 Minn. 528, 54 N. W. 481, and was "of that importance and so liable to possible abuse, fraud or mistake that the parties to be affected thereby should have an opportunity to be heard." *Worthington vs. Hewes & McCann* (1869), 19 Ohio St. 66.

3. A Hearing of the Parties before the Arbitrators Was Required by Law

In *Worthington vs. Hewes & McCann, supra,* there was involved a certain lot of land subject to a 99-year lease. The lease contained a covenant providing that, at the end of the first fifteen years, the value of "said lot of ground, without reference to the buildings and other improvements * * *, should be appraised and valued by three intelligent and disinterested men, * * *". Suit was brought by the plaintiff (the owner) on the award. Defendants demurred to the petition, one of the grounds being that they should have had an opportunity to be heard by the appraisers before the award was made. In the syllabus it is said:

> "* * *
>
> "5. When it is reasonably practicable, an opportunity should be given the parties to be heard by the appraisers, before making their valuation; otherwise it will not be binding upon the party deprived of such opportunity."

At pages 77-78 of its opinion, the court said:

> "IV. * * * **In view of the importance of the interests to be affected, and the length of time for which the appraisement is to last, it seems to us it ought not to be made in the absence of the parties, and without consulting them, where it is reasonably practicable to give them a hearing. In so holding it is unnecessary to say whether the proceeding is to be regarded as an arbitration or not.** It is surely not in the nature of an arbitration, so far as regards any

> supposed right of the parties or privies, to revoke the authority of the appraisers. **But we think it is a proceeding of that importance, and so liable to possible abuse, fraud, or mistake, that the parties to be affected thereby should have an opportunity to be heard. That such opportunity was afforded to the defendants in the present case, does not appear by the plaintiff's petition, and the demurrer thereto was, therefore, properly sustained.''**

It will be noted that this court does not find it necessary to determine whether the proceeding is an appraisal or an arbitration. A proceeding of this kind is of the **importance** of a strict arbitration.

The *Worthington* case has never been overruled or in any way qualified in later decisions of the Supreme Court of Ohio.

The *Worthington* case is not unique. See, for example, *Janney S. & Co., vs. Goehringer, supra*, where the 1st syllabus is as follows:

> ''1. A lease of real estate for a term of years provided that upon its termination the lessors should purchase from the lessees, at the fair market value, the buildings which the latter might have erected, and that the value should be conclusively determined by three appraisers, for the selection of whom, in the usual way, the lease provided. It being necessary for the appraisers to construe the contract for the purpose of determining the basis upon which the value was to be estimated, **held**, that an appraisal made without opportunity afforded to the parties to be heard was invalid.''

In the opinion of the court it is said:

> ''* * * In such a case the parties had the same right to be heard before their cause was adjudged as they would have in any general arbitration.'' (P. 482.)

It is apparent that in our case many troublesome considerations would at once confront the arbitrators or appraisers. For example: Is the ground to be valued as encumbered by the lease, which is extremely favorable to lessee? Is the fair market value to be determined as in case of sale, or for the purpose of the lease? Is it proper to consider the value of the ground to the lessee, or must the value be determined generally?

In view of the language of our lease, "to determine and fix the fair market value" and "in joint session," we think the following case from New York is extremely helpful:

In *Brown vs. Lyddy* (New York, 1877), 11 Hun. 451, a lease containing a privilege of renewal provided that, if the parties were unable to agree upon the rent, an arbitrator should be chosen by each party, the two to "ascertain" the value of the lot, and allow five per cent thereon as rent; and if they were unable to agree, that they should choose an umpire, whose decision should be final. The following is taken from the opinion of the court:

> "* * * The appraisers, as we have seen, were to ascertain the value, but in what manner is not stated, whether by the exercise of their own knowledge and judgment or by a hearing at which the parties could produce witnesses. The word **'ascertain,'** however, has its meaning, and therefore, its force, to make sure or certain; to fix; to establish; to **determine**; to settle are the definitions of that word, according to Worcester, and this would seem to demand the observance of the usual mode of investigation in order to establish, **to determine,** to settle the value. The right of the parties to a hearing, and to produce witnesses, is one of the established privileges (*Elmendorf vs. Harris,* 23 Wend. 628), although it may be waived by them. The courts would not declare that such a right did not exist, unless the terms of the submission so provided, or a waiver, **was clearly demonstrated.** * * *" (P. 456.)

In the courts below opposing counsel endeavored to make it appear that the *Worthington* case has been overruled by *Royal Insurance Co. vs. Ries,* 80 Ohio St. 272, 88 N. E. 638 (1909). That case had to do with appraisal of fire loss of personal property, the loss amounting to approximately $1,000.00, pursuant to the terms of the standard insurance policy. The key words of the policy call upon the appraisers "to estimate and appraise the loss." The *Ries* case does not purport to discuss or affect the doctrine of the *Worthington* case; indeed, that case is not even mentioned.

We respectfully submit that the *Ries* case has not the slightest bearing on the situation we have here. Two entirely different types of contract are presented; the subject matter is entirely different. Under insurance policies, there is provision for an umpire in case the two appraisers appointed by the parties are unable to agree as to loss, and the umpire deals only with items as to which the appraisers are unable to agree. Frequently the losses involved under such policies are extremely small; whereas, in the instant case and in many cases like it, large amounts are often involved and important rights of the parties affected for many years.

In the instant case, the lease does not speak of "appraisers" who are to "estimate and appraise the loss," as in the standard fire insurance policy; it speaks of "arbitration" and of "arbitrators" who shall "in joint session, by a majority vote, determine and fix the fair market value of the real estate." This language by itself, particularly in view of the subject matter and the importance of the rights to be affected, would seem clearly to call for an intelligent inquiry, a hearing. Moreover, the *Worthington* case, calling for a hearing in a case of this kind, was an integral part of the contract of lease.

4. The Arbitrators Ignored Petitioner's Request for a Hearing

This has significance; it introduces an additional element. Even in insurance appraisal cases, the courts regard this as a matter of importance.

It will be sufficient in this connection to cite one case—*Aetna Insurance Co. vs. Jester,* 37 Okla. 413; 132 Pac. 130. That case has to do with an appraisal under a fire insurance policy. There the court says:

> "It is true that there are cases which hold that it is not necessary for the appraisers to hear parties, **but no case has been found where the appraisal was upheld when the appraisers had refused to hear the parties, or one of them.** * * *"

5. Respondent Was Given an Ex Parte Hearing before the Arbitrators

In the case of *Van Cortlandt vs. Underhill,* 17 Johnson (N. Y.) 405, there was involved a lease which provided for the appraisement of certain mill properties at the termination of the lease. The court found that the lease contemplated **something akin to an arbitration.** The opinion of one of the judges includes the following:

> "It is further alleged, that this award ought to be set aside for the misbehavior or misconduct of the arbitrators: 1st **in holding a private and** *ex parte* **meeting or communication with one of the parties, on the subject before them**; and 2nd for refusing to hear evidence material to the inquiry, with regard to the same subject, offered by one of the parties.
>
> "There can be no doubt, if either of these charges is substantiated, that it must prove fatal to the award. * * *" (Pp. 417-418.)

See, also *Elmendorf vs. Harris,* (N. Y. 1840), 23 Wendell, 627:

> "* * * If I am correct as to this principle, it neces-

sarily follows that where the arbitrator proceeds entirely *ex parte*, without giving the party against whom the award is made, any notice of the proceedings on the submission, the award is without authority and void.

"The only case I have been able to find in our own reports upon this point, is *Peters vs. Newkirk*, 6 Cowen 103, referred to in the opinion of the late Chief Justice Savage in the present case. There the Supreme Court of this state distinctly decided, that an appraisement which was to control the rights of parties, in the nature of an award, was a nullity, the appraisement having been made by the arbitrator to whom the parties had agreed to submit the question, on the *ex parte* application of one party only, and without any notice whatever to the other party, who was not present. In *Lutz vs. Linthicum*, 8 Peters' R. 178, Mr. Justice Story, in reference to such a proceeding, says that without question due notice should be given to the parties of the time and place of hearing; and if the award was made without such notice it ought, upon the plainest principles of justice, to be set aside." (Pp. 632-633.)

The so-called Reuben brief, besides affording respondent an *ex parte* hearing, also operated as an *ex parte* communication from the respondent through Mr. Reuben to Mr. Price. This practice is universally condemned.

"* * * Likewise, the award will usually be set aside where it appears that one of the parties communicated with the arbitrators privately."

3 American Jurisprudence, 963.

The note to this text cites the *Michigan* case, to be referred to in a moment, and also the Annotations appearing in *8 A. L. R.* 1088, and *11 L. R. A.* 626.

In the note to the text on the same subject in *Pomeroy's Equity Jurisprudence*, 5th Edition, Vol. 3, page 610 (*supra*), the following cases are cited:

Catlett vs. Dougherty, 114 Ill. 569 (1885);

Hewitt vs. Reed City, 124 Mich. 6, 50 L. R. A. 128 (1900);

Jenkins vs. Liston, 13 Grattan's Reports 535 (Va. 1856);

Sisk vs. Garey, 27 Md. Rep. 401 (1867).

In the case of *Catlett vs. Dougherty,* 114 Ill. 569 (1885), it is said in the syllabus:

> "1. It is sufficient to authorize a court of equity to enjoin a suit at law upon an award, and set aside the ward, that one of the parties in interest made a statement to one of the arbitrators, in the absence of the adverse party, **designed and having a tendency to improperly affect his decision as an arbitrator, without showing that such statement, in fact, produced any harmful result to such other party.**"

In the case of *Hewitt vs. Reed City,* 124 Mich. 6, 50 L. R. A. 128 (1900), the court says:

> "* * * The rule is very strict in excluding any communication to an arbitrator, made *ex parte* after the case is submitted; and when such communication, which may affect the result, is made, it is not usual to enter into an inquiry as to whether the arbitrator was in fact influenced by it or not. * * * It is contended that this rule should not be applied to the present case, as all that occurred was a mere citation of authorities; but it is to be kept in mind that the arbitrator is judge of the law as well as of the facts, and in this case the parties expressly agreed that neither was to be represented by counsel, thereby stipulating to exclude all legal arguments or briefs. It cannot be denied that the purpose of any citation must have been to influence the mind of the arbitrator on a question of law. * * *"
>
> (*50 L. R. A.*, pp. 128-129.)

In the case of *Jenkins vs. Liston,* 13 Grattan's Reports 535 (Va., 1856), at page 539, the court says:

> "It may therefore be safely declared that an award

> cannot be sustained if made in favor of a party who has secretly offered evidence which has been received by the arbitrators whilst acting in their capacity as such. Nor will the case be withdrawn from the operation of the general rule by proof that the award would have been the same without such proof. The law in its jealousy will not permit an enquiry into the effect of the evidence so received; it tends to partiality and corruption, and nothing less than the complete vacation of the award will satisfy the law."

In the case of *Sisk vs. Garey,* 27 Md. Rep. 401 (1867), paragraph 4 of the syllabus is as follows:

> "Where certain matters were submitted to arbitration, and the parties appeared before the arbitrators, and each filed a statement setting forth his charges, demands and claims against the other, and after the hearing was closed, the arbitrators received a statement from one of the parties, containing new and different items of claim from any presented at the hearing, and without the knowledge of the other party, a court of equity will enjoin a suit at law upon the award, and set it aside."

6. Mr. Price Acted as Umpire, Not as Third Arbitrator as Required by Lease

The lease in the instant case called for the joint deliberations and joint judgment of the arbitrators, after hearing and full debate. Mr. Crosby and Mr. Reuben, under the terms of the lease, had no power, until the third arbitrator was appointed, to do anything except to agree, or to attempt to agree, on the third arbitrator. This they were unable to do, and the Common Pleas Judge, under the terms of the lease, appointed Mr. Price. Mr. Price quite obviously thought that it was his function to resolve the differences between Mr. Crosby and Mr. Reuben, instead of entering into a joint debate with them on the subject of the valuation. He thought he was the umpire. Accordingly, after

receiving the written statements of Messrs. Crosby and Reuben, he proceeded to decide the matter—he did decide it. (R. pp. 676, 677.) The $950,000.00 value fixed by Mr. Price does not, of course, represent Mr. Crosby's judgment; it does not represent Mr. Reuben's claimed judgment; it does not even represent Mr. Price's judgment—he thought it a little high himself. (R. pp. 677, 743, 745.) What Mr. Price did was to decide the matter, in a false atmosphere and without light, without cross examination and without debate—a compromise decision, by which petitioner alone was compromised.

In the case of *Hughes vs. National Fuel Co.*, (Supreme Court of West Virginia, June 20, 1939), 3 S. E. (2d) 621, it is said:

> "* * * Where a controversy is submitted to arbitrators (provision not made for an umpire) the award must be concurred in by all or a majority of the arbitrators, depending on the express or implied terms of the agreement to arbitrate. Morse on Arbitration and Award, pp. 162, 163. An umpire is one clothed with authority to act alone in rendering a decision where the arbitrators have disagreed. 3 Am. Jur., p. 913." (P. 626.)

> "§82.—Umpire and Additional Arbitrator Distinguished.—A clear distinction exists between an umpire and an additional arbitrator. The former has power to settle the dispute by his sole award; the latter does not, but acts only in conjunction with the other arbitrators. * * * Where the agreement provides for an even number of arbitrators with power to select another person to pass upon the issues, and also contains a provision that in event of disagreement an award by a majority of the arbitrators shall be final, a person so selected is an **additional arbitrator, and not an umpire**, for it is plain that he is to act with the arbitrators first appointed."

3 American Jurisprudence, 914.

7. The Award Is Grossly and Palpably Inadequate

The value of the property determined by the Common Pleas Court was $1,500,000.00 (R. p. 30), which is $550,000.00 in excess of the award. (Pl's Ex. 9, R. p. 150.) The Court of Appeals did not consider the second cause of action, and, therefore, did not review the evidence in the record as to the value of the property. It merely said that an inadequacy of such a staggering amount did not in and of itself indicate fraud or irregularity. (R. p. 116; Opinion, Appendix, pp. 65-66.) We say that such an inadequacy is shocking to the conscience, and, when stated to a man of common sense informed as to the facts, would "produce an exclamation at the inequality of it." Coupled with the "inequitable incidents" disclosed by the record, the inadequacy clearly and unmistakably shows that the award was the result of mistake, fraud, bias or prejudice.

The law as to inadequacy is well set forth and applied in the case of *Sholz vs. Mills*, 176 Mo. App. 352, 158 S. W. 696 (1913). The tenth syllabus is as follows:

> "10. An appraisement of land, as for the purpose of fixing the rent, may be so palpably excessive or inadequate as to show that it was not the honest judgment of the appraisers, and, even though the excess or inadequacy is not so marked, it may be considered in connection with other circumstances showing ground to set aside the award."

In its opinion at page 378 the court says:

> "In the case before us it is not the mere inadequacy of the appraisement (although it is manifestly so low as to strongly appeal to the conscience of the court) nor a mere error of judgment on the part of the appraisers that furnishes the ground for setting aside the appraisement; but, * * * it is their mistake of fact as to that which they were to determine and what they were to take into consideration, their misconception of the duties of their position whereby they (unintentionally and without improper motives

> we have no doubt) acted with partiality, so that the appraisement made did not in any proper sense reflect their real judgment and opinions touching the value of the property in question. * * *"

The rule expressed and followed in the *Missouri* case is universally followed by other courts. See *6 C. J. Secundum*, Sec. 90, page 236.

For the application of these principles generally in contract cases, conveyances and transactions of many other types, see *Pomeroy's Equity Jurisprudence* (5th Edition, 1941, Symons), Vol. 3, pages 634, 636, 640 to 643.

8. The Award Is Tainted With Conspiracy and Fraud

Fraud vitiates everything. This is a familiar principle and needs no citation of authority.

We submit that this case fairly reeks with fraud. This is evident, we think, from what has already been said, particularly under the heading "Statement of Case."

As to the character of the written statement submitted by Mr. Reuben to Mr. Price, we wish to add the following observations: It was deliberately planned, without regard to truth or common honesty, to sell Mr. Price on the proposition that respondent could not pay as ground rent as much as $39,000.00 per year, the fixed amount it paid in 1938 and in a number of prior years under the terms of the lease, in addition to large sums for bond retirement, interest, taxes, *et cetera*. (Pl's Ex. 11.) If the value fixed by Mr. Price is to stand, the ground rent under the lease at 4% will amount to $38,000.00 per year. That will be the only rent, except taxes, **the bonds having been fully retired in 1939.** Obviously Mr. Price, who says he did not make an independent check of the matters set forth in the Reuben statement and who accepted the whole of it at face value (R. pp. 719-721), arrived at his decision on the basis of respondent's false representations of its ability to pay

rentals and its false representations of business and trade conditions, and not on the basis of the value of the property.

It appears also from his own testimony that he regarded the 99-year lease in question as an encumbrance on the real estate. (R. pp. 723, 724.)

The evidence shows from the lips of Mr. Sigmond Sanger, the secretary and chief counsel, and Mr. Richard Lennihan, president (then vice-president), of respondent, how the written statement presented by Mr. Reuben to Mr. Price was prepared. If the testimony of Mr. Sanger (R. pp. 160-212) is read by the Court, we are satisfied that the Court will at once get the complete background which resulted in the so-called award, and of his complete willingness to shape his testimony so as to conceal his active connection with the scheme to mislead and impose upon Mr. Price as the third arbitrator.

The arbitrators agreed among themselves that Mr. Crosby and Mr. Reuben should each present to Mr. Price written statements setting forth their opinions of value of the property and their reasons in support thereof. This understanding contemplated only their individual presentation. That this was recognized by Mr. Reuben and respondent is demonstrated by the extreme care taken by Mr. Sanger to hide his authorship of the Reuben statement. (R. pp. 160-212.) It was palmed off on Mr. Price as the individual work of Mr. Reuben. Neither Mr. Price nor Mr. Crosby ever knew what actually happened until after this case was filed and the true facts were then exposed.

9. The Award Was the Result of Fundamental Mistakes on the Part of Mr. Price

(a) It Was Based upon the Tax Valuation

The authors of the Reuben statement made a supreme effort to convince Mr. Price that the land value was no greater than the tax value. This is obvious from Pl's Ex.

11. The tax value was emphasized from beginning to end. We contend that it was not even competent evidence and should not have been considered.

The rule is stated in *20 American Jurisprudence,* page 348, as follows:

> "The general rule is that the valuation placed upon property by a public official for the purposes of taxation only, without participation on the part of the owner or assent by him thereto except by paying the taxes assessed, is not competent evidence on a litigated question of its value for purposes other than taxation. Assessment rolls are no evidence of the market value of the property assessed. * * *"

See, also: *2 Jones Commentaries on Evidence,* 2nd Edition, page 1313; *22 Corpus Juris* 178, Section 172; *17 Ohio Jurisprudence* 221-222, Section 172.

There is an Annotation on this subject in *17 A. L. R.*, page 170, and a supplemental Annotation in *84 A. L. R.* 1485.

It may be said that the overwhelming weight of authority supports the rule as stated. The Supreme Court of Ohio has not spoken on the subject.

Apart from the law as to the admissibility of tax valuations in cases of this kind, it is well known that, as a practical matter, tax valuations frequently bear little relationship to real values or fair market values. In the courts below, opposing counsel made reference to a well known writer concerning real estate appraisals, namely, *Philip W. Kniskern.* He discusses this subject in his work entitled *"Real Estate Appraisal and Valuation,"* and concludes his discussion with the following paragraph:

> "By reason of the methods which are of necessity followed, the results obtained are of very little value as evidence of a justified market value, as a guide to investment, or of the amount that may safely be loaned against a property on mortgage. **The results sought are so different from the objects of an ordi-**

nary appraisal that many of the methods followed in assessing are not suited and are positively dangerous if applied to the type of work discussed in this volume." (P. 103.)

(b) THE AWARD WAS BASED ON THE THEORY THAT THE VALUE TO BE DETERMINED WAS THE VALUE TO RESPONDENT, AND NOT THE VALUE GENERALLY, AND ALSO ON THE THEORY THAT THE LEASE WAS AN ENCUMBRANCE

The syllabus, so far as is pertinent, in *Lowe vs. Brown*, 22 Ohio St. 463 (1872), is as follows:

> "Where it was stipulated in an indenture by which a building lot was leased for ninety-nine years, renewable forever, that, at the expiration of each successive period of twenty years, the 'ground' should be revalued by 'three disinterested men'—one to be selected by the lessor, one by the lessee, and the third by the two thus chosen—who should appraise the same at its 'true value,' * * * HELD:
>
> * * * * *
>
> "4. The value contemplated by the lease is not the rental value of the ground, but its real worth at the time it is required to be appraised, excluding all improvements on the premises."

In the opinion, it is said:

> "3. * * *
>
> "* * * To arrive at this basis, appraisers were to 'view the **ground**' and 'appraise the **same** at its **true** value.' It is clear from this language that the true value contemplated by the covenants of the lease as the basis of the amount of rent, was the fee-simple value of the ground alone, without reference to the purpose for which it was leased, or the character of the improvement thereon. * * *" (P. 468.)

In *Springer vs. Borden*, 112 Ill. App. 168 (1904), there was involved a lease of a certain lot in the City of Chicago. The rent up to a certain date was fixed by the lease, and the lease provided that "during the residue of the term

the lessee should pay a sum equal to five per cent of the cash value of the demised premises, exclusive of the building and improvement." The cash value of the premises was to be fixed by three appraisers. In the opinion, the court says:

> "It was the LOT which was leased and it was the LOT which was to be appraised. **The existence of the lease or its terms and conditions may affect favorably or unfavorably the value of the rights and interest of the lessor in the lot, but they can not affect the value of the lot itself.**
>
> "**In determining the value of the lot for the purposes stated in the lease, it is clear that the cash value of the lot contemplated by the covenants of the lease was the cash value of a fee simple estate in said lot; the cash value of every interest in and right to said lot, considered for the purpose of such valuation as vacant property.** * * *"

The court in *Springer vs. Borden* states that only three cases involving directly the same question were brought to its attention, and that the decision in each of those cases supports the conclusions reached. The cases referred to are: *Philadelphia Library Co. vs. Beaumont,* 39 Penn. S. 43; *Lowe vs. Brown,* 22 Ohio St. 463; *Goddard vs. King,* 40 Minn. 164.

In *Goddard vs. King,* the Supreme Court of Minnesota said:

> "The fact that under the lease the defendant might use the land for a particular purpose, or that he was restricted by it to a particular use, and the fact that plaintiffs had given the defendant a long lease of the land, had nothing whatever to do with its value as between them under the lease, for the valuation was not to be made for the purpose of a sale of the land, thus encumbered, by one to the other. The referees ought to have estimated the market **value of the land as it would have been with the lease** and **improvements** made by the lessee **off.**" (Pp. 166, 167.)

CONCLUSION

We feel that this is a most unusual case and one of exceptional merit. We believe that there has been a grave miscarriage of justice, which this Court alone can correct. We submit that this is not a case where mere prejudicial errors have been committed by the courts, but one in which petitioner's fundamental rights under Section 1 of the Fourteenth Amendment have been violated, in that the judgment of the Court of Appeals upholds an award made without a hearing and in that the errors of the court are so gross and obvious as to amount to arbitrary and capricious exercise of power.

Respectfully submitted,

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